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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR-8**
v.	**GOVERNMENT'S RESPONSE TO DEFENDANT SANTILLI'S MOTION TO DISMISS COUNT 1 – UNCONSTITUTIONALLY VAGUE AS-APPLIED (#477)**
PETER SANTILLI,	
Defendant.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to defendant's Motion to Dismiss Count 1 – Unconstitutionally Vague As-Applied (ECF No. 477) and its supporting Memorandum (ECF No. 478), filed by defendant Santilli.

Defendant seeks an order dismissing Count 1 of the Superseding Indictment, which alleges that he violated the provisions of 18 U.S.C. § 372 (Section 372), because the statute is

unconstitutionally vague as applied to his case. Defendant's Motion should be denied. Defendant has failed to demonstrate that Section 372 in his case did not provide adequate notice of the proscribed conduct nor has he adequately demonstrated that its enforcement against him has been arbitrary.

I. Statutory Vagueness—"As Applied"

Defendant is charged with one count of Conspiring to Impede Officers of the United States in violation of Section 372. Defendant repeatedly claims that he was charged in this case because he was exercising his First Amendment rights of speech, assembly, and freedom of the press in opposition to the government. (Def.'s Mem. 3; 8). Defendant was charged in this case because he is alleged to have conspired with others through the use of force, threats, and intimidation, to impede federal officers from doing their jobs. The fact defendant believes he has a viable First Amendment defense to the charged conduct is immaterial to the issue before the Court in this Motion—whether Section 372 provided him sufficient notice of the proscribed criminal conduct and whether its enforcement was arbitrary.

A. Vagueness

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *United States v. Zhi Yong Guo*, 634 F.3d 1119, 1121 (9th Cir. 2011). A defendant is deemed to have fair notice of an offense if a reasonable person of ordinary intelligence would

understand that his or her conduct is prohibited by the law in question. *United States v. Hogue*, 752 F.2d 1503, 1504 (9th Cir. 1985); *see also United States v. Lanier*, 520 U.S. 259, 267 (1997).

B. Defendant Received Adequate Notice

Defendant claims that he did not received adequate notice under Section 372 because the statute "does not provide notice that it might be invoked to criminalize . . . speech and assembly." (Def.'s Mem. 5). Defendant received fair notice that his conduct was criminal because Section 372 "define[s] the criminal offense with sufficient definiteness that ordinary people can understand." *Kolender*, 461 U.S. at 357. As the government has indicated before, the terms of Section 372 easily provide adequate notice to a person of ordinary intelligence. "Force," "intimidation," or "threat" are neither complicated terms nor ones that evade common understanding. They are unremarkably common. *See United States v. Osinger*, 753 F.3d 939, 945 (9th Cir. 2014) (rejecting a vagueness challenge to 18 U.S.C. § 2261A(2)(A) despite the lack of statutory definitions for "harass" and "substantial emotional distress" because these terms are neither esoteric nor difficult to comprehend). *Webster* dictionary defines "force" as "physical strength, power, or effect." *Miriam-Webster Dictionary*, http://www.merriam-webster.com (last visited May 11, 2016). "Threat" and "intimidation" are equally clear. *Webster* defines "threat" as "a statement saying you will be harmed if you do not do what someone wants you to do" and "intimidation" as "to make (someone) afraid." *Id.*

Similarly, the terms "officer" or "duties" clearly provide notice regarding their intended meaning. Indeed, both "officer" and "duties" are remarkably straightforward compared to some of the terms the Ninth Circuit has held were sufficient for purposes of conveying notice. *See*

Osinger, 753 F.3d at 945 (upholding statute's use of term "substantial emotional distress"). In this case, defendant's own conduct unscored that he knew precisely the meaning of all of these terms—he frequently broadcasted his opinion about the role of many of the federal employees associated with the Refuge during the time period of the conspiracy. (Def.'s Mem. 5).

Simply because defendant self-identifies as a member of the "press" does not mean that Section 372 is uniquely unclear in providing him legally sufficient notice. Defendant contends that he failed to receive adequate notice because law enforcement never "indicated" that his rallying cry violated any laws and that he was not immediately arrested in Nevada for "playing a far more active role." (Def.'s Mem. 6-7). The law regarding notice does not require that law enforcement explain to defendant that his conduct may be prohibited. Rather, the issue turns on whether the statute provided adequate notice about the conduct. For the reasons stated above, it does.

Finally, the Ninth Circuit has rejected a vagueness challenge to a far more opaque violation of Section 372 in a case where the role of the First Amendment was central to the underlying facts. *See, e.g.*, *United States v. Fulbright*, 105 F.3d 443 (9th Cir. 1997) (rejecting defendant's vagueness challenge to Section 372 in case where he was convicted after mailing an "arrest warrant" to federal bankruptcy judge; and where the court notes in denying defendant's challenge: "This appeal deals with the dangerous intersection in a free society, one at which the expression of discontent or disagreement with the actions of government can collide with legitimate efforts to deal with actions intended to threaten or impede federal officials in carrying out their duties."), *overruled on other grounds by United States v. Heredia*, 483 F.3d 913 (9th Cir.

2007); *see also United States v. Chung*, 622 F. Supp. 2d 971 (C.D. Cal. 2009) (court denied defendant's challenge to the Economic Espionage Act after he was convicted of violating its terms by disclosing trade secrets to the People's Republic of China). Defendant is unable to show that Section 372 is unconstitutionally vague as applied to his case.

C. Section 372—Arbitrary Application to Defendant

Defendant also claims that Section 372 is vague as applied to him because "it is so standardless that it permits arbitrary enforcement." (Def.'s Mem. 8). Defendant claims that he was targeted for prosecution because of anti-government views. (Def.'s Mem. 9). In support of this defendant claims that there were many other members of the press who were not charged in connected with the takeover of the Refuge. Defendant mischaracterizes his role in the offense. Other members of the media were not "similarly situated." Defendant is alleged to have conspired with the other charged defendants, an allegation that requires specific intent on defendant's part, thus contradicting any suggestion that he was selected from a list of otherwise detached members of the press for prosecution. Finally, the mere fact that law enforcement officers sometimes exercise discretion relative to charging decisions does not render a statute unconstitutionally vague. *See, e.g., United States v. Ninety-Five Firearms*, 28 F.3d 940 (9th Cir. 1994) (noting that prosecutorial discretion does not equate to arbitrary enforcement for purposes of a vagueness challenge).

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II. Conclusion

For the reasons stated above, defendant's Motion that Section 372 is unconstitutionally vague as applied to his case should be denied.

Dated this 11th day of May 2016.

Respectfully submitted,

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s/ Ethan D. Knight
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